UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION

LIFE CARE CENTERS OF AMERICA, INC.
d/b/a LIFE CARE CENTER OF PLAINWELL[1]

Employer

and

CASES GR-7-RC-21626
GR-7-RC-21627

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 79, AFL-CIO

Petitioner

APPEARANCES:
Edwin S. Hopson, Attorney, of Louisville, Kentucky, for the Employer.
Cynthia Brooks and Bruce Tribble, of Detroit, Michigan, for the Petitioner.

DECISION AND DIRECTION OF ELECTION

Upon petitions duly filed under Section 9(c) of the National Labor Relations Act, as amended, hereinafter referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,[2] the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

[1] The Employer's name appears as corrected at the hearing.

[2] Both parties filed briefs, which have been carefully considered.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

5. The Employer owns 223 residential nursing homes in 28 states, including the facility at issue located in Plainwell, Michigan. Although it has seldom been fully occupied, the Plainwell facility (hereafter "facility") is licensed to house 125 residents. They are assigned to either the skilled nursing unit called "Bridge," whose residents are largely on Medicare, or the long-term care nursing unit called "Wood," whose residents are mostly on Medicaid. The facility's total staff approximates 129, of whom 10 individuals are stipulated supervisors.[3] There is no history of collective bargaining at the facility.

The Petitioner initially filed separate petitions, seeking in Case 7-RC-21626 an election among about 100 certified nursing assistants (hereafter "CNAs") and other service and maintenance employees, and in Case 7-RC-21627 an election among about 25 licensed practical nurses (hereafter "LPNs"), registered nurses (hereafter "RNs"), physical therapists, occupational therapists and social workers. At the hearing, the Petitioner amended the petitions to seek a self-determination election in one overall unit. The Employer stipulated to the appropriateness of the same. The parties further stipulated to the statutory professional status of the occupational therapists, physical therapists, speech therapists and RNs, and to the appropriateness of excluding the business office clerical employees from the overall unit.

The issues remaining include the eligibility of 2 unit managers and about 12 charge nurses, who the Employer asserts are statutory supervisors; the MDS coordinator, who the Employer contends is managerial; and the restorative nurse and social services director, who the Employer urges are either supervisors or managerial employees. The Petitioner claims to the contrary that all such individuals are eligible to vote. The parties also disagree about the proper unit placement of the medical records and central supply room (CSR) clerks, whom the

[3] The parties stipulated to the statutory supervisory status of Executive Director Bill Hekkert (Herrick, as per the Employer's brief), Business Office Manager Dawn Cook, Director of Nursing George Raj, Staff Development/Infection Control Coordinator Debra Brule, Staff Development Coordinator Alisa Turner, Rehabilitation Services Manager Veronica Tultz, Food Services Supervisor John Filter, Housekeeping Supervisor Robin Hildebrand, Maintenance Supervisor Bob Churty and Activities Supervisor Jennifer Adams. They further agreed that although there is no incumbent in the position, the assistant director of nursing has been a supervisor in the past, and will be once again when hired. The record indicates that all such individuals possess, at the least, the authority responsibly to direct the staff in the interest of the Employer. On this basis, I concur in the stipulations.

Employer would exclude as business office clericals and the Petitioner believes share a community of interest with various included employees.

Unit Managers

Unit Managers Melissa Henckel and Erin Termeer, who work weekdays during the day shift, oversee the nursing personnel of the Bridge and Wood units, respectively. Two charge nurses and three or four CNAs on the day shift report directly to each of them. As set forth in more detail *infra*, each unit manager periodically serves as an on-call resource. When her on-call duty arrives every seventh week, the unit manager has superintendent responsibility over the two charge nurses and two to four CNAs on each of the other two shifts.[4]

Unit managers attend a daily meeting of a group called the nurse administration team. Patient care issues and information are the focus of these meetings. From patient care plans prepared by others, unit managers almost daily develop sheets that specify the care, treatments and procedures that must be performed on each resident. These sheets function as instructions for the charge nurses and CNAs.

Unit managers spend an unspecified amount of time doing patient rounds, where they observe first-hand the work of CNAs and charge nurses. The director of nursing (hereafter "DON") typically delegates to unit managers the task of preparing written performance evaluations for charge nurses and CNAs. The numerical grades given by unit managers dictate, by a pre-determined and fixed formula, whether an employee will receive a raise and how large it will be. Although it appears that the unit manager's assigned grades are normally undisturbed, the record contains evidence that the DON has at times prevailed upon the unit manager to modify the numbers. Unit managers have no role in setting the grade-to-raise formula. All raises must be approved by the DON.

An individual referred to as a "scheduler," whose identity, eligibility and unit placement were not covered in the record, makes out the weekly work schedules for nursing personnel. Unit managers are not involved in that process. Similarly, the scheduler rather than the unit manager assigns charge nurses and CNAs to a particular set of resident rooms, or "units." The unit manager may vary the unit assignments in order to equalize work or to separate feuding workers.

The DON or scheduler rather than the unit manager passes upon requests by charge nurses and CNAs for days off. Although a unit manager nurse may grant a CNA permission to leave due to a personal emergency, only the DON or assistant DON decides whether an absence is excused. If employee absences cause the staff to fall short of governmentally prescribed minima, the unit manager has the authority to require an employee to stay beyond

[4] The record does not disclose the exact number of charge nurses and CNAs on the afternoon and midnight shifts. The numbers above use the day shift staffing levels as a benchmark.

her normal quitting time or to require an off-duty employee to report to work. The unit manager sets up CNA break times on the day and afternoon shifts. The charge nurses enforce those times so as to keep adequate coverage.

Until recently, unit managers played no part in the hiring process. In mid-August 1999, the Employer informed unit managers, both in a meeting and through the distribution of new job descriptions, that henceforward they will participate in the first interview of prospective charge nurses and CNAs. According to testimony of the DON, a negative recommendation will halt further consideration of the applicant, provided that the unit manager states grounds that convince the DON to look elsewhere. The DON will re-interview all candidates who pass the unit manager's muster and then consult with the unit manager for her impressions before a final decision is made. At the time of the hearing, neither unit manager yet had occasion to participate in this process.

Unit managers are entitled to eject a CNA from the floor immediately for refusing an order. No specific instances were cited.

Previously, unit managers could prepare formal disciplinary reports for charge nurses and CNAs based on observed malperformance or misconduct. The reports were submitted to the DON, who occasionally undertook an independent investigation and routinely both decided upon the level of discipline and met with the employee to administer it. In mid-August 1999, the Employer advised unit managers that they were now authorized to issue disciplinary notices without prior approval of the DON. The only illustration of this expanded role was a written warning dated August 19. This was issued by a unit manager at the specific behest of the DON, who had already taken statements from two witnesses complaining of poor care by the CNA in question.

Unit managers are hourly paid. Their rates, from $17 to $18.20 per hour, exceed the wage ranges of both RN and LPN charge nurses.

Charge Nurses

The facility employs two charge nurses for each shift, one on the Bridge and the other on the Wood unit. The day shift charge nurses report directly to the unit manager. Charge nurses on the afternoon and midnight shifts report problems to the on-call nurse. This is a member of the nurse administration team mentioned above, most of whom are stipulated supervisors. All charge nurses are either LPNs or RNs. Although the State permits RNs to perform more complicated nursing procedures, there is no distinction between LPNs and RNs in respect to their authority over CNAs.[5]

[5] The Employer's nurses include those in the disputed classifications enumerated above and those named above who are stipulated supervisors. The Employer does not employ any undisputed non-supervisory staff nurses.

Charge nurses spend the greatest portion of their time passing medicines, offering fluids and nutrition, performing treatments, following physician orders, assessing patients, and notifying doctors and family members in the event of problems. They also review the work of the one to three CNAs in their charge. If the charge nurse notes a deficiency in the CNA's performance, a note will be recorded on a "round sheet" submitted to the DON. The charge nurse may also offer on-the-spot coaching in proper procedure. Formal retraining, as indicated on the basis of a competency skills check list prepared by the charge nurse, is conducted by the staff development coordinator, a stipulated supervisor.

CNAs derive their general directions from their training and orientation. Their specific daily instructions for each patient come from the sheets prepared regularly by the unit manager based upon the patient care plans generated by the various coordinators and directors as described *infra*. Charge nurses do not prepare the care plans or instruction sheets.

As noted above, the scheduler makes out work schedules covering five-week periods. This document assigns on- and off-days as well as room assignments to the CNAs. Shifts are designated by the DON, taking employee preference into account. Breaks are allocated by the unit manager. The charge nurse is not responsible for making any of these decisions. However, the charge nurse may reallocate room assignments in order to spread the work more evenly or to compensate for a new CNA's inexperience.

Where employee absence threatens to bring the CNA staffing level below the government mandate, the charge nurse will ask an on-duty CNA to stay later or an off-duty CNA to report early. This may result in overtime for the compliant CNA. The record suggests that the charge nurse's role is only precatory, and that the unit manager or on-call nurse will be notified if the charge nurse has been unsuccessful in obtaining the needed help.

A CNA who asks a charge nurse for permission to leave work early is normally referred to the DON, executive director or unit manager. If a charge nurse has evidence that a CNA has either abused a patient, arrived in an intoxicated state or defied a direct order, the charge nurse has authority summarily to eject the CNA for the remainder of the shift. All such occurrences would contravene express Employer rules. In fact, suspected patient abuse requires removal of the implicated employee as a matter of law and regulation. The one occasion noted in the record where a charge nurse faced such a situation involved a CNA suspected of intoxication. In that instance, the matter was reported to the DON, who independently investigated and followed through with discipline.

Under the Employer's past practice, charge nurses participated in writing CNA performance evaluations only when no unit manager or acknowledged supervisor had personal familiarity with the CNA's work. This seldom happened except on the midnight shift. One witness stated that in three years, she was asked to prepare only one evaluation. In that case, she included only a narrative of observations and did not meet with the employee, leaving to the DON the task of assigning numerical grades, deciding the impact on wages, and holding

the employee appraisal meeting. Most charge nurses who testified at the hearing stated having no previous knowledge that specific numerical grades translated to pre-set percentage wage increases. An Employer witness testified that the Employer plans to train charge nurses how to complete evaluations. As of the hearing, this apparently had not yet occurred.

Charge nurses have served as witnesses of CNA misfeasance. They have also counseled them using a now-discarded form that called for a description of the employee's transgression and the charge nurse's suggestion for improvement. These reports entered the employee's permanent personnel file, but constituted only a precursor of formal discipline. In one instance in 1995 where a charge nurse assisted in writing a more formal disciplinary report, the charge nurse noted only the facts, while the executive director completed the portion assigning the penalty. Indeed, prior to mid-August, charge nurses were not expressly authorized to issue written reprimands or suspensions at their own discretion. By virtue of new job descriptions distributed in mid-August, they now have the authority to discipline CNAs "as appropriate, according to facility policies." No exercise of that new authority was adduced. Nor does it appear that charge nurses have access to CNA personnel files, which are kept in the front business office and available to unit managers only on an individual sign-out basis.

Charge nurses have no involvement in excusing employee absences. They do not participate in hiring or laying off staff. They are not permitted to alter employee work schedules except as necessitated by prescribed staffing guidelines. There is no evidence that they have authority to adjust employee grievances. They are hourly paid. Charge nurses with LPN licenses earn from $13.25 to $17 per hour, while those with RN licenses earn from $15.77 to $16.91 per hour.

Social Services Director

The social services director, who is required to have a bachelor's degree and one year of experience, interacts with the patient and patient's family to address concerns and develop a care plan. The care plan includes suggested approaches, strategies and goals, e.g. "encourage resident to reminisce," that constitute guidelines for the nursing staff. The social services director does not personally observe the nursing staff handling the residents. If desired outcomes are not being achieved, the social services director may recommend more staff training or launch a fact-finding investigation, the results of which are submitted to nursing management for review and possible disciplinary action. The social services director does not make disciplinary recommendations or take disciplinary action.

The social services director attends a daily morning patient update meeting attended by department heads, chairs a committee dealing with patient behavior management, and attends and conducts training sessions or "in-services." He helps develop Employer policy regarding patient behavior assessment and the proper implementation of professional recommendations such as those of referring psychiatrists. He has no access to labor or employee relations

materials, no role in setting nurses' or CNAs' hours, and no responsibility for making assignments to or directing the work of nurses or CNAs.

Until July 1999, the social services director was aided by an assistant. The two functioned as co-workers, with the director taking care of the residents in the Bridge unit and the assistant, who has a bachelor's degree, handling those in the Wood unit. Around July, the director left and the assistant, Thomas Colucci, was promoted to acting social services director, with a corresponding raise of $5 per hour. No assistant was hired, leaving the social services department with only one staff member. The previous social services director had been hourly paid. Colucci was offered and declined to be paid on a salaried basis.

As acting social services director, Colucci has never prepared an employee evaluation. Nor did his immediate predecessor director, who occupied the position only about six weeks. The record shows only two occasions when a social services director has evaluated an employee, both times her own assistant. Once, the social services director later confessed to her assistant that the executive director had reprimanded her for issuing the evaluation without the executive director's prior approval. On another occasion, the evaluation followed a special meeting regarding job performance that the social services assistant initiated not with the social services director, but with the facility's executive director. The social services director's subsequent evaluation of this employee matched the tenor of the executive director's appraisal during the meeting. The assistant resigned shortly after the evaluation for undisclosed reasons. The record does not reveal what impact, if any, either evaluation had upon the assistant's wages and working conditions.

An Employer witness suggested that the social services director controls a patient trust account. It appears that the authority of the social services director in this area is closely monitored and circumscribed. If a family member is unable to buy needed incidentals for a resident and the resident signs an approval, the social services director applies to the Employer's business office and obtains funds held in the resident's account to make the purchase. The social services director returns with the item, a receipt and any change.

The Employer stated that it has recently hired Pat Seeley to be the new social services director. Evidently Seeley has not yet begun working. Colucci's status upon Seeley's arrival was not disclosed.

Restorative Nurse

The goal of restorative therapy is to continue enhancing a resident's functions and abilities after physical and occupational therapists have laid the groundwork. Incumbent Restorative Nurse Sheryl Johnston evaluates residents and helps establish restorative programs, which are then carried out by two full-time CNAs specially trained in restorative techniques,

and two on-call physical therapy (hereafter "PT") aides.[6] Johnston shares a basement office with the physical therapist and the central supply room (CSR) clerk. She is paid $17 per hour. This sum represents a raise that, until the week of the hearing, was denied her on the grounds that her responsibilities were not equivalent to those of unit managers.

Johnston has contributed to two employee evaluations, both CNAs. In one case, the DON asked her to change her assigned numerical grades. In the other, the DON completed the form herself. Until the hearing, Johnston was unaware that the Employer had a formula linking evaluation grades and percentage wage increases.

By deciding which residents to add to the restorative therapy patient load, Johnston influences the amount of work to be performed by CNAs and PT aides. She also creates detailed work sheets for each patient, describing such things as the distance the patient should be ambulated per session and which limb needs to be exercised. The question of which patients to care for is left to the CNAs and PT aides themselves, who typically arrive one hour before Johnston does, divide the work themselves and start work in Johnston's absence.

Johnston considers it within the scope of nursing practice to counsel CNAs and PT aides, and to remove a misbehaving employee from a patient's room. The Employer offered conclusionary testimony that the restorative nurse may independently discipline employees. However, it did not adduce evidence as to how or when this asserted authority was communicated. To the contrary, Johnston testified that she has not been informed that she has the authority to discipline employees on her own without the DON's approval. There is no evidence that she has made recommendations in that area and she has never discharged an employee. Until the hearing, she had never seen the employee warning form that the Employer uses for formal discipline. It is her impression that her role in discipline is to make a factual report to the DON and then to carry out what the DON determines is appropriate.

Johnston recently attended a hiring interview. This was the first time she was asked to do so. The DON explained that her role in the hiring process is to conduct the initial interview as a fact-gathering session. The DON reserved the right to make the final decision. On this recent occasion, the DON did not divulge to Johnston whether or not the candidate was hired. Earlier, when Johnston asked for more help, the Employer hired an aide with no input from Johnston in the interview or selection process.

CNAs' and PT aides' hours are set by the scheduler, not Johnston. Johnston makes no decisions on employee vacation requests and there is no evidence that she establishes or recommends employee pay scales. She spent more time in direct patient care until recently, when the frequency of meetings concerning patient care expanded. The restorative nurse is

[6] The record does not indicate the hours of the physical therapy aides. I am therefore unable to determine at this time whether they are regular part-time employees. Consequently, they may vote subject to challenge by any party.

part of the nursing administration team and as such is on-call during off shifts about every seven weeks. Johnston reports directly to the DON.[7]

MDS Coordinator

The minimum data set (hereafter "MDS") coordinator is a licensed RN whose job is to file for Medicare and Medicaid reimbursements. The incumbent is Lawrence Pickard. He works weekdays from 8:00 a.m. to 4:30 p.m. No one is assigned to work under him.

Pickard explained that his knowledge of applicable MDS regulations and requirements comes from a manual issued by the Federal Government. MDS information is forwarded by Internet to the State of Michigan. While some of the data is inputted by Pickard, much of it comes from various department heads. If a deadline approaches, Pickard reminds the participants to complete the necessary information themselves directly on the computer form. If they fail to do so, Pickard brings the matter to the DON's or executive director's attention. He is not authorized to discipline personnel for delay in furnishing information.

A successful application for reimbursement requires that claims be properly documented. To this end, Pickard prepares patient assessments, attends patient care meetings, reviews and counsels staff on the proper way to chart events and document changes, and helps formulate patient care plans. If he notices that an employee has committed a treatment or charting error, he may call the unit manager's attention to the situation. There is no evidence that he is authorized to, or in practice does, recommend discipline on that basis.

As a member of the nurse administration team that the Employer devised in April 1999, Pickard is on call every seventh week. He has never received training for this task. He described that his principal function as an on-call nurse is to help make telephone calls in the event of short staffing. He has never been asked to handle a disciplinary matter while on call.

There is no evidence that any MDS coordinator has ever filled out an employee evaluation form. Nor is there evidence that the MDS coordinator grants time off, sets or changes employee work schedules or makes assignments. In fact, the MDS coordinator does not implement any personnel actions or recommend the same.[8] The record is equally barren of evidence that the MDS coordinator has a role in setting Employer policy with respect to wages, hours, working conditions, or any other labor relations matters.

The Employer has not granted Pickard discretion in the manner of his completion of the MDS form. Rather, the process appears to be subject to rigid rules imposed by the

[7] The degree to which the work of the restorative CNAs and PT aides may come within the purview of the unit manager as well as the restorative nurse was not explored on the record.

[8] When he was a unit manager, Pickard once co-signed a written warning issued to a CNA. As MDS coordinator, he has not disciplined employees.

government. Pickard has no authority to pledge the Employer's credit and he is paid at the hourly rate of $17.25. He spends approximately 60% of his time at his computer or working alone in the office that he shares with medical records personnel. The badge on his standard white nurse's uniform identifies him as "MDS Nurse."

CSR and Medical Records Clerks

The CSR clerk orders all of the medical supplies for the nursing department. She then inventories the supplies and places them in the proper carts, units and supply rooms. Her office is located in the facility's basement. The position is currently occupied by Susan Parrish, who works full-time as a clerk and part-time as a CNA. She is paid hourly and reports to the DON.

The medical records clerk, Kathy Ford, inputs medical records into the facility's computer system. She also charts audits, takes paperwork to physician offices for signing, and does typing and filing. She is paid hourly, reports to the DON, and works weekdays 6:30 a.m. to 3:00 p.m. She shares office space with the MDS coordinator.

The record is silent as to exactly how the CSR and medical records clerks receive the supply and charting information on the basis of which they complete their respective tasks. Nor does the record disclose the frequency of their interaction with service and maintenance, technical or nursing personnel.

All persons employed at the facility, including the clerks and all other persons in dispute, receive the same package of fringe benefits.

Analysis

Managerial employees are narrowly defined as employees in executive positions who have authority to formulate, determine or effectuate employer policies with respect to employee relations matters. ***NLRB v. Yeshiva University***, 444 U.S. 672 (1980); ***North Arkansas Electric Cooperative***, 185 NLRB 550 (1970). Supervisors are defined in the Act at Section 2(11), which lists 12 categories of personnel actions that may impart supervisory status. An employee need possess only one of such indicia in order to come within the statutory definition, provided that the individual exercises the authority in the interest of the employer using independent judgment. ***NLRB v. Health Care & Retirement Corp.***, 114 S.Ct. 1778, 146 LRRM 2321 (1994); ***Phelps Community Medical Center***, 295 NLRB 486 (1989).

None of the persons urged by the Employer meets the managerial test. An individual does not acquire managerial status by making decisions within established limits set by management or exercising judgment on matters falling within the confines of his field of professional expertise. The social services director and restorative nurse may make recommendations regarding the provision of patient care, but the executive director sets facility

policy. For the most part, decisions made by the social services director and restorative nurse are simply an outgrowth of their specialized or therapeutic knowledge. The MDS coordinator discharges his function adhering to strict governmental guidelines regarding the perfecting of reimbursement claims. None has been invested with authority to operate independently of Employer policy. More importantly, the record is devoid of evidence that any of them are involved in formulating or effecting labor relations policies such as the setting of employee wages, the implementation of employee benefit programs or the establishment of disciplinary protocols. These individuals are therefore not excludable on the basis of managerial status.

I find the evidence for the supervisory status of the social services director and restorative nurse also lacking. At the time of the hearing, the social services director acted alone in the department. It is unknown how, if at all, the position may change when the new director comes on board. Historically, the social services director has had no part in disciplining employees outside the social services department. Even when the director has had an assistant, there is no evidence that the former made assignments, set hours or wages, hired or disciplined. The sole arguable supervisory evidence is that a past social services director twice prepared a written evaluation of her assistant. One was completed without the executive director's prior approval and earned the social services director a reprimand, implying that the action was ultra vires absent the executive director's review and assent**.** The other mirrored impressions of the assistant set forth in a prior memo written by the executive director. The evaluation itself did not contain a recommendation for or against a raise, and the record does not divulge what affect the evaluation had upon the assistant's wages or tenure. A duty to evaluate is not supervisory where the evaluation is primarily reportorial and does not constitute an effective recommendation to reward or discipline. ***Lynwood Health Care Center, Minnesota, Inc. v. NLRB***, 148 F.3d 1042, 1046-47 (8th Cir. 1998); ***Custom Mattress Mfg.***, 327 NLRB No. 30, slip op. 1-2 (Oct. 20, 1998).

In respect to the restorative nurse, the Employer relies primarily upon her role in assigning, disciplining, evaluating and hiring restorative CNAs and PT aides. The evidence as a whole is unpersuasive.

The restorative nurse crafts detailed protocols for each patient based upon her assessment of the resident's needs and her knowledge of professional norms of treatment. She does not delegate specific tasks or residents to the employees in her department. Rather, they distribute the assignments using their own judgment and preferences. The authority of the restorative nurse to create discrete tasks based on her own experience, skills, training and professional knowledge is not supervisory where it is unaccompanied by the exercise of independent judgment in the making of particular assignments. See ***Providence Hospital***, 320 NLRB 717, 729 (1996), enfd. 121 F.3d 548 (9th Cir. 1997).

The weight of the evidence does not establish that the restorative nurse is actually empowered to discipline employees. Thus, Johnston testified that she has never been informed of any such authority and is unfamiliar with the Employer's disciplinary form. Conclusionary

testimony without more does not establish supervisory status. ***Sears, Roebuck & Co.***, 304 NLRB 193 (1991). The oversight that Johnston exercises with respect to correction and counseling is merely reportorial and nothing more than the exercise of her greater skill and competence. It is not the predicate of supervisory authority. ***NLRB v. Attleboro Associates, Ltd.***, 176 F.3d 154, 174 (3rd Cir. 1999); ***NLRB v. Grancare, Inc.***, 170 F.3d 662, 668 (7th Cir. 1999); ***Northern Montana Health Care***, 324 NLRB 752, 753 (1997).

The claim that the restorative nurse has evaluated employees must take into account Johnston's testimony that on the occasions when she was involved, the DON either countermanded the numerical grades that Johnston assigned or completed the form herself. As noted above, Johnston was unaware before the instant hearing of the exact relationship between the evaluation and employee wage increases. It must be concluded that Johnston's role in evaluating has not been to recommend reward or discipline, but rather simply to provide a first-hand progress report. This is not supervisory. ***Lynwood Health Care Center, Minnesota, Inc. v. NLRB***, supra; ***Custom Mattress Mfg.***, supra.

The Employer presented evidence that it intends to expand the number of participants in the hiring process. To this end, Johnston recently attended her first hiring interview. However, the record does not establish that she made an effective recommendation based on the interview. To the contrary, the DON advised her that her role at the interview would be informational and that the final decision would be his. In fact, a verdict was rendered without her knowledge. The restorative nurse's limited function in the hiring process appears designed to assure the Employer of the professional or technical competence of the applicant. It does not carry the requisite power effectively to recommend and therefore cannot support a supervisory finding. ***Esco Corp.***, 298 NLRB 837 (1990); ***Graphics Typography, Inc.***, 217 NLRB 1047, 1053 and fn.16 (1975), enfd. mem. 547 F.2d 1162 (3rd Cir. 1976).

Finally, the restorative nurse's turn as the on-call nurse every six or seven weeks fails to invest her with supervisory status. The evidence indicates that the on-call nurse does nothing more than assist charge nurses in telephoning CNAs to request them to cover staff shortages. The on-call restorative nurse may also convey information to the DON in the event that a CNA has been asked to stay overtime. Because the requests are made to satisfy existing staffing guidelines mandated by the government, any consequent overtime must be considered pre-approved by the highest level of the facility's management. Further, seeking voluntary replacements for absent employees does not constitute supervisory authority. ***Youville Health Care Center***, 326 NLRB No. 52 (Aug. 27, 1998); ***Providence Alaska Medical Center v. NLRB***, 121 F.3d 548, 552-54 (9th Cir. 1997); ***Children's Habilitation Center, Inc. v. NLRB***, 887 F.2d 130, 134 (7th Cir. 1989); ***NLRB v. City Yellow Cab Co.***, 344 F.2d 575, 579 (6th Cir. 1965).

The Employer has presented a sufficient quantum of evidence to show that the unit managers possess supervisory authority. I base this conclusion upon their authority to require CNAs to arrive early or stay late, and lately to issue disciplinary warnings on their own

authority and without the prior approval of the DON. Another basis for the finding is their historic and continuing duty to prepare written evaluations of charge nurses and CNAs. The evaluations encompass numerical grades on which financial reward will be granted or denied. Although the unit managers have not developed the grade-to-raise formula and all raises must be approved by the DON, the record suggests that, unlike the restorative nurse, unit managers are aware of the formula and how the numerical grades that they award will affect the employee's wage level. Thus, through evaluations unit managers make effective recommendations regarding wages and possible promotions.

Accordingly, I find that Unit Managers Melissa Henckel and Erin Termeer are ineligible to vote as statutory supervisors.[9]

In contrast, the charge nurses do not exercise independent judgment within the meaning of Section 2(11) of the Act. The CNAs' work assignments devolve from detailed care plans prepared by unit managers. The resultant directives given to the lesser skilled CNAs by more knowledgeable charge nurses are routine instructions falling within these precise parameters to maintain the quality of care. This does not amount to statutory supervisory direction. ***Rest Haven Living Center, Inc.***, 322 NLRB 210, 211 (1996); ***Ten Broeck Commons***, 320 NLRB 806, 807, 809-12 (1996); ***VIP Health Services, Inc. v. NLRB***, 164 F.3d 644, 649 (D.C. Cir. 1999).

Charge nurses do not schedule CNAs' work shifts, hours or breaks. They are not empowered to decide if an absence is excused. As explained above in respect to the restorative nurse, their role in requesting coverage to satisfy government staffing requirements and the impact of those actions upon overtime are not indicia of supervisory status. E.g. ***Youville Health Care Center***, supra. Their limited authority to make adjustments to CNAs' resident room assignments to equalize work loads and compensate for a recent hire's inexperience is a routine exercise of professional judgment, not the demonstration of supervisory authority. ***Washington Nursing Home***, 321 NLRB 366 fn.4 (1996); ***Altercare of Hartville***, 321 NLRB 847 (1996); ***Providence Hospital***, 320 NLRB at 727, 731; ***NLRB v. Aquatech, Inc.***, 926 F.2d 538, 543, 549 (6th Cir. 1991), enforcing 297 NLRB 711, 717 (1990).

The oral and written counseling and coaching provided by charge nurses to CNAs have traditionally been unaccompanied by recommendations for further discipline. The unit manager or DON has often undertaken an independent investigation and decided on that basis what level of discipline is warranted. This reportorial and didactic function of charge nurses does not amount to statutory supervision. ***Passavant Health Center***, 284 NLRB 887, 889

[9] Substitute Unit Manager Rhonda Preston fills in for Henckel and Termeer during their absences and vacations. Otherwise Preston serves as a charge nurse. In the absence of record evidence concerning the frequency of Preston's stints as unit manager, I am unwilling to disenfranchise her on that account. ***Aladdin Hotel***, 270 NLRB 838 (1984) (sporadic and intermittent substitution for supervisor does not divest individual of employee status).

(1987); ***Waverly-Cedar Falls Health Care Center v. NLRB***, 933 F.2d 626, 630 (8th Cir. 1991); ***NLRB v. City Yellow Cab Co.***, 344 F.2d at 580-81.

The authority of charge nurses to remove an abusive CNA from a patient's room and to eject a drunk or insubordinate CNA from the facility is mandated by law in the first two cases and by the Employer's clear policy in the third. After the charge nurse has defused the situation, such incidents are subject to independent review and investigation by the DON. The taking of limited action in response to flagrant violations is insufficient by itself to establish supervisory status. ***Phelps Community Medical Center***, 295 NLRB 486, 492 (1989); ***Loffland Bros. Co.***, 243 NLRB 74, 75 fn.4 (1979); ***Waverly-Cedar Falls Health Care Center v. NLRB***, 933 F.2d at 630, enforcing 297 NLRB 390, 391, 393 (1989).

The Employer professes to have recently invested charge nurses through a revised job description to discipline ancillary employees "as appropriate, according to facility policies." This newly enunciated authority has not been exercised to date. It apparently remains the case that charge nurses do not have access to employee personnel files. Nor is it certain whether discipline henceforth initiated by charge nurses will be subject, as before, to independent review by conceded supervisors. The mere articulation of this ambiguous authority in a new, untested job description is an insubstantial basis on which to make a supervisory finding. The same job description's purporting to assign charge nurses authority to make "recommendations" in a host of personnel areas such as staffing needs and transfers is equally unexplained and unsupported by practical examples. Without more, I am unable to credit this paper authority as a conveyance of authority to make effective recommendations using independent judgment. ***Crittenton Hospital***, 328 NLRB No. 120 (June 30, 1999); ***East Village Nursing & Rehabilitation Center v. NLRB***, 165 F.3d 960 (D.C. Cir. 1999).

Charge nurses have rarely completed evaluations. They did so only when conceded supervisors had no personal knowledge of the CNA's work quality. There is no demonstration that charge nurses have been instructed to use the evaluations as a mechanism for making raise recommendations. Indeed, most charge nurses who testified professed to ignorance that specific rankings led to pre-ordained financial consequences. The minor role that charge nurses have played in evaluating CNAs is insufficient to support a supervisory finding. ***Custom Mattress Mfg.***, supra; ***Lynwood Health Care Center, Minnesota, Inc. v. NLRB***, supra; ***New York University Medical Center v. NLRB***, 156 F.3d 405, 413 (2nd Cir. 1998).

Charge nurses do not adjust employee grievances, nor do they participate in hiring or layoff decisions.

The final argument for inferring supervisory status is that the afternoon shift charge nurses after about 5:30 p.m., and the midnight charge nurses for the preponderance of their shift, are the highest level nursing personnel at the facility. Six of the eight individuals who share on-call duties, however, are supervisors. Moreover, the record does not set forth any concrete examples of exigent non-routine circumstances occurring on off shifts requiring

charge nurses to make independent judgments about supervisory matters. Consequently, this factor alone is not dispositive of the charge nurses' status. ***Children's Habilitation Center, Inc. v. NLRB***, 887 F.2d at 133, 134; ***NLRB v. KDFW-TC, Inc.***, 790 F.2d 1273, 1279 (5th Cir. 1986); ***NLRB v. Heid***, 615 F.2d 962, 964 (2nd Cir. 1980); ***Oil, Chemical and Atomic Workers Int. Union v. NLRB***, 445 F.2d 237, 241-42 (D.C. Cir. 1971). Further, I note that if charge nurses are found to be supervisors, the ratio of supervisors to employees would range from 1:1 to 1:3. ***Naples Community Hospital***, 318 NLRB 272 (1995); ***Essbar Equipment Co.***, 315 NLRB 461 (1994); ***Beverly California Corp. v. NLRB***, 970 F.2d 1548, 1550 fn. 3 (6th Cir. 1992).

For the foregoing reasons, I find that the charge nurses are statutory employees.

The last issue to be decided is the unit placement of the CSR and medical records clerks. The Board distinguishes business office clericals, whom the parties here stipulated to exclude, from other clericals who have contact with hospital service and maintenance or nursing personnel. E.g. ***Rhode Island Hospital***, 313 NLRB 343, 359 (1993). Based on this record, I find that the CSR and medical records clerks, both of whom report directly to the DON, have the requisite degree of interaction with nursing and service personnel to warrant their inclusion in the petitioned-for overall unit.[10]

6. Based upon the entire record, and in accordance with the above findings and party stipulations, I conclude that the following constitutes an appropriate unit of employees for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time certified nursing assistants, nursing assistants, helping hands, physical therapy assistants, restorative assistants, occupational therapy assistants, activities assistants, housekeeping aides, laundry aides, maintenance employees, dietary aides, cooks, assistant social services directors, central supply (CSR) clerks, medical records clerks, licensed practical nurses, licensed practical nurse charge nurses, registered nurses, registered nurse charge nurses, social services directors, MDS coordinators, restorative nurses, physical therapists, occupational therapists and speech therapists employed by the Employer at its facility located at 320 Brigham, Plainwell, Michigan; but excluding office clerical employees, guards and supervisors as defined in the Act.

The unit set forth above includes both professional and nonprofessional employees. The Board is prohibited by Section 9(b)(1) of the Act from including professional employees in a unit with nonprofessionals unless a majority of the professional employees votes for inclusion in such a unit. Accordingly, the desires of the professional employees as to inclusion

[10] Even if CSR clerk Susan Parrish were not properly included on that ground, she would be eligible to vote on the alternative basis that she is a regular part-time CNA.

in a unit of nonprofessional employees must be ascertained. I shall therefore direct separate elections in the following voting groups:

> VOTING GROUP (A): All full-time and regular part-time certified nursing assistants, nursing assistants, helping hands, physical therapy assistants, restorative assistants, occupational therapy assistants, activities assistants, housekeeping aides, laundry aides, maintenance employees, dietary aides, cooks, assistant social services directors, central supply (CSR) clerks, medical records clerks, licensed practical nurses and licensed practical nurse charge nurses employed by the Employer at its facility located at 320 Brigham, Plainwell, Michigan; but excluding registered nurses, registered nurse charge nurses, social services directors, MDS coordinators, restorative nurses, physical therapists, occupational therapists, speech therapists, office clerical employees, guards and supervisors as defined in the Act.
>
> VOTING GROUP (B): All full-time and regular part-time registered nurses, registered nurse charge nurses, social services directors[11], MDS coordinators, restorative nurses, physical therapists, occupational therapists and speech therapists employed by the Employer at its facility located at 320 Brigham, Plainwell, Michigan; but excluding certified nursing assistants, nursing assistants, helping hands, physical therapy assistants, restorative assistants, occupational therapy assistants, activities assistants, housekeeping aides, laundry aides, maintenance employees, dietary aides, cooks, assistant social services directors, central supply (CSR) clerks, medical records clerks, licensed practical nurses and licensed practical nurse charge nurses, office clerical employees, guards and supervisors as defined in the Act.

The employees in the nonprofessional voting group (A) will be polled to determine whether or not they wish to be represented by the Petitioner.

The employees in voting group (B) will be asked two questions on their ballot:

1. Do you desire to be included in a unit composed of all eligible employees of the Employer of the above-determined appropriate unit for the purposes of collective bargaining?

2. Do you desire to be represented for the purposes of collective bargaining by Service Employees International Union, Local 79, AFL-CIO?

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[11] The parties did not stipulate as to the professional status of the social services director. Based on the evidence that the Employer expects the director to have earned a bachelor's degree, the incumbent acting social services director has a bachelor of science degree, and the nature of the work appears to be predominantly intellectual and varied in character requiring the use of discretion and judgment, I find that the social services director is a professional within the meaning of Section 2(12) of the Act and it is appropriate to include that classification among the other professionals in Voting Group B.

If a majority of the professionals in voting group (B) votes "yes" to the first question indicating their desire to be included with all eligible employees, they will be so included. Their vote on the second question will then be counted together with the votes of the nonprofessional group (A) to determine whether or not the employees in the overall unit wish to be represented by the Petitioner. If, on the other hand, a majority of the professionals in voting group (B) votes against inclusion, they will not be included with the nonprofessional employees. Their votes on the second question will then be separately counted to determine whether or not they wish to be separately represented by the Petitioner.

My unit determination is based, in part, upon the results of the election among the professionals. However, I now make the following findings in regard to the appropriate unit:

1. If a majority of the professionals votes for inclusion in the unit with nonprofessional eligible employees, I find that the following will constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time certified nursing assistants, nursing assistants, helping hands, physical therapy assistants, restorative assistants, occupational therapy assistants, activities assistants, housekeeping aides, laundry aides, maintenance employees, dietary aides, cooks, assistant social services directors, central supply (CSR) clerks, medical records clerks, licensed practical nurses, licensed practical nurse charge nurses, registered nurses, registered nurse charge nurses, social services directors, MDS coordinators, restorative nurses, physical therapists, occupational therapists and speech therapists employed by the Employer at its facility located at 320 Brigham, Plainwell, Michigan; but excluding office clerical employees, guards and supervisors as defined in the Act.

2. If a majority of the professionals does not vote for inclusion in the unit with nonprofessional eligible employees, I find that the following two groups of employees will constitute separate units appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> (a) All full-time and regular part-time certified nursing assistants, nursing assistants, helping hands, physical therapy assistants, restorative assistants, occupational therapy assistants, activities assistants, housekeeping aides, laundry aides, maintenance employees, dietary aides, cooks, assistant social services directors, central supply (CSR) clerks, medical records clerks, licensed practical nurses and licensed practical nurse charge nurses employed by the Employer at its facility located at 320 Brigham, Plainwell, Michigan; but excluding registered nurses, registered nurse charge nurses, social services directors, MDS coordinators, restorative nurses, physical therapists,

occupational therapists, speech therapists, office clerical employees, guards and supervisors as defined in the Act.

(b) All full-time and regular part-time registered nurses, registered nurse charge nurses, social services directors, MDS coordinators, restorative nurses, physical therapists, occupational therapists and speech therapists employed by the Employer at its facility located at 320 Brigham, Plainwell, Michigan; but excluding certified nursing assistants, nursing assistants, helping hands, physical therapy assistants, restorative assistants, occupational therapy assistants, activities assistants, housekeeping aides, laundry aides, maintenance employees, dietary aides, cooks, assistant social services directors, central supply (CSR) clerks, medical records clerks, licensed practical nurses and licensed practical nurse charge nurses, office clerical employees, guards and supervisors as defined in the Act.

Those eligible to vote shall vote as set forth above and in the attached Direction of Election.

Dated at Detroit, Michigan, this 24th day of September, 1999.

(SEAL)

/s/ Stephen M. Glasser
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